SUPREME COURT, U. S.

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(Submitted with the Consent of the Parties)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—v.—

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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Interest of The Authors League

The Authors League is a national society of professional writers and dramatists; one of its principal purposes is to express their views on fundamental issues of copyright law. The League files this brief (with the parties' consent) because the Court of Claims decision raises questions of enormous importance and grave concern to professional authors.

Preliminary Statement

The majority opinion (487 F.2d 1345) held that the "wholesale, machine copying and distribution of copyrighted material by defendant's libraries on a scale so vast that it dwarfs the output of many small publishing companies" is—"fair use". Consequently, the Court denied the plaintiff reasonable compensation for the reprints of its copyrighted articles produced by the libraries. The quoted description of the libraries' activities is Chief Judge Cowen's (487 F.2d 1364); but it accurately delineates the large reprint publishing operation conducted by the government's libraries at substantial cost to the public. "Business-as-usual" payments are made to the Xerox Corporation (in the form of per-page "royalties") and to the suppliers of other equipment and materials, and normal compensation is paid to library employees for their services in operating and supervising this wholesale reproduction service. Judge Cowen's description also fits the "one-at-a-time" reprint publishing operations conducted by other library networks, and by commercial firms, including the highly successful Xerox subsidiary, University Microfilms.

The rights at issue here are those secured to authors by Sec. 1(a) of the Copyright Act. The majority below ruled that these rights do not permit authors, or publishers who acquire the rights from them, to secure compensation when libraries reproduce copies of their copyrighted works for patrons. This ruling could diminish or destroy the author's income from the medium which first disseminates his work, from other media which may subsequently reproduce and distribute it, and from the new single-copying medium created by improvements in reproduction tech-

nology. The ruling will also seriously injure private-enterprise publishing which is essential to professional authors and their readers. By reducing publishers' income and prospective income, all authors (including scientists and scholars who submit articles without compensation, and profit by kudos, promotion and other substantial emoluments) may suffer an even more drastic injury—the ultimate discontinuance of a periodical, journal or publishing house. The majority's opinion rationalizes its result by invoking the "public interest"; but its concept of the "public interest" is myopic and self-defeating. In the end, the public interest and science would be seriously injured by the Court of Claims' decision.

Summary of Argument

I. The Court of Claims flouted the Constitutional purpose of the copyright clause by denying petitioner compensation for the government's production of copies of its articles. Dissemination of scientific articles is impossible unless publishers invest labor and money to edit and produce their journals. Compensation for use of their articles in the new medium of "one-at-a-time" reproduction is essential to meet rising costs and help provide a reasonable reward for continuing an economically marginal enterprise that benefits science and the public interest.

II. The rights "to copy", "to print" and "to reprint", granted to copyright owners in Sec. 1(a) (17 U.S.C.) include the reproduction of copies of copyrighted works, one-at-a-time. The right "to publish", granted by the section, includes the circulation of copies, one-at-a-time, one to a user.

III. The government's wholesale reproduction of copyrighted articles was not "fair use", whether or not it damaged petitioner or will adversely affect the potential market for its articles and journals. In any event, there was more-than-ample evidence that the government's systematic reproduction service would have that adverse effect: i.e. ultimately reducing present subscriptions, foreclosing new subscriptions, and reducing petitioner's income from licenses to libraries and reproduction centers to reproduce "single copies".

IV. Congress has refused to legislate a reproduction licensing system, so that the majority cannot achieve the stated aim of its opinion, i.e. to compel such legislation. The Congress' "preferred" solution is voluntary licensing systems negotiated by copyright owners and librarians. The majority opinion prevents that. If it is reversed, Sec. 1498(b) [28 U.S.C.] provides the necessary impetus and protection to both sides so that they must voluntarily negotiate mutually acceptable licensing arrangements.

POINT I

The Constitutional Purpose of Copyright is Frustrated by Denying Petitioner Compensation for the Reproduction of its Copyrighted Articles.

As Chief Judge Cowen indicated, the majority opinion of the Court of Claims contradicts the "economic philosophy" underlying the copyright clause of the Constitution. It does so needlessly (see Point IV) and at grave risk to the public interest it purports to serve.

Article I, Section 8 authorizes Congress to secure to authors "the exclusive rights in their respective writings."

The power is not merely discretionary. The phrase "Congress shall have the power" does not precede the copyright clause. It prefaces all the powers granted to Congress including the powers to collect taxes, borrow money, regulate commerce and raise armies. Obviously, Section 8 intended that Congress would enact copyright laws, as well as exercise these other vital functions.

As this Court stated in *Mazer* v. *Stein*, 347 U.S. 201 (1954), the copyright clause "was intended to grant valuable, enforceable rights to authors, publishers, etc. . . . 'to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world.'" (at p. 219). The "economic philosophy" behind the copyright clause, said the Court:

> "is the conviction that encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"

Thus, the Constitution provides that the public interest in securing the creation of literary and scientific works be promoted by having authors and publishers depend on a private enterprise-property rights system: i.e., property rights in the works they create (17 U.S.C. 1 & 101) and dependence on personal gain from these property rights to compensate for their talent, labor and risks. The oft-painful consequence of this "economic philosophy" is that "sacrificial hours devoted to such activities" may result in losses rather than gains.

The author's copyright is not a form of property which is detrimental to the public interest. It is not an antitrust "monopoly". It does not give him control of the market in

books, only over specified uses of the particular work he created—which must compete in the market place with thousands of other works. Moreover, his property rights do not prevent others from using his ideas or writing on the same subject. As Henry George aptly noted:

> "Copyright . . . . does not prevent any one from using for himself the facts, the knowledge, the laws or combinations for a similar production, but only from using the identical form of the particular book or other production—the actual labor which has in short been expended in producing it. It rests therefore upon the natural, moral right of each one to enjoy the products of his own exertion, and involves no interference with the similar right of any one else to do likewise . . . .
>
> The Copyright is therefore in accordance with the moral law—it gives to the man who has expended the intangible labor required to write a particular book or paint a picture security against the copying of that identical thing." Henry George, PROGRESS AND POVERTY, p. 411.

A copyright, like all other property, is "a creature and creation of law . . . " (73 C.J.S. PROPERTY, Sec. 1, p. 145) Like all other property, it is a bundle of exclusive rights granted by the state, through legislation or court decision. Thus, property rights in billions of dollars worth of land, oil and other natural resources have been created by Acts of Congress. Yet there is one distinction between the Copyright Act and these other statutes. They granted individuals exclusive rights in resources that belonged to the Nation, that were part of the public domain. The Copyright Act grants the author exclusive rights in something that he created and that belonged to him under common law; and it ultimately takes his creation from him and places it in the public domain.

In denying petitioner reasonable compensation for the use of its property, the Court of Claims flouted the Constitutional purpose of the copyright clause. Obviously, the dissemination of scientific articles from petitioner's journals serves the public interest. But that dissemination is made possible only by petitioner's labor and investment. Unless it selected the articles from a mass of manuscripts, edited them, set them in type, bound them and distributed them—the Xerox machines at NLM and NIH could only have churned out blank pages.

The very purpose of the copyright clause is to permit petioner to receive reasonable compensation for its indispensable efforts from those who reproduce or make other uses of its copyrighted works. And that compensation should not be limited to subscriptions or reprint sales lost now or in the future because of the wholesale reproduction service operated by the government's libraries. This systematic reproduction of articles on demand is a separate medium for distributing them; as distinct from the distribution of the original journals as the distribution of mass-market paperback reprint editions is from the sale of the original higher-priced hardcover editions of the same books. Under the Copyright Act, petitioner is entitled to compensation for the use of its property in this separate medium, just as authors and publishers of sheet music were entitled to compensation when their compositions later were disseminated in other media (radio, motion pictures and television), and as the authors of hardcover books were entitled to receive compensation when their works were subsequently reproduced in paperback editions (or reproduced in anthologies, newspapers or other media).

The reasonable compensation which petitioner asked the Court of Claims to set would not have "stopped" the systematic reproduction of journal articles by NIH and NLM. Their reproduction service operated vigorously despite vastly greater payments to the Xerox Corporation, other suppliers and library employees—all for the purpose of producing and distributing reprints of petitioner's articles, and other copyrighted works. The Xerox Corporation, for example, received a specified fee for each page of each copy of petitioner's articles reproduced by the government libraries. And had the libraries ceased paying their employees, these people would have stopped reproducing petitioner's articles. But since no further tangible contribution was required from plaintiff to reproduce copies of its already-published articles, why—the Court of Claims may have theorized—bother to pay it?

The "economic philosophy" of the copyright clause answers this question. The state cannot expect publishers or professional authors—independent entrepreneurs—to *continue* investing their talent, time and money in the creation or publication of new copyrighted materials, if it permits others to appropriate the fruits of their labor without reasonable compensation. As the record amply demonstrates, the publishing of medical and scientific journals, while richly serving the public interest, is at best a marginal economic operation. Where there are profits, they are modest; neither the petitioner nor the learned societies for whom it published some journals grew fat from these periodicals.

Squeezed by ever-increasing costs and static circulations, publishers inevitably will be forced to close down some jour-

nals if they are denied reasonable compensation for the uses of their material in the new medium of systematic, one-at-a-time reproduction of articles. Periodicals and journals are neither immortal nor immune from the laws of economics. Faced with rising costs and limited revenues, the publishers of many ostensibly successful commercial periodicals—e.g. LIFE, LOOK, SATURDAY POST, etc. etc.—were forced to terminate their existence. The death throes of some scientific and technical journals may last longer, and their inevitability may not be neatly provable, to the satisfaction of the Court of Claims. But given that Court's decision, it is only a matter of time before the same fate overtakes some of these periodicals.

Moreover, the "economic philosophy" of the copyright clause envisions that the copyright owner will receive not merely the marginal income needed to sustain his publication, but also compensation for his labor and risk—i.e., "gain" which, under a private enterprise system, is "the best way to advance the public (interest)" in securing the creation and publication of scientific articles or other copyrighted works. That gain* can only be earned through payments from those who exercise the copyright owner's rights in his work—e.g. by reproducing copies of it. Those payments may come from the ultimate users, as part of their purchase price of copies; or it may be paid by institutions or governmental agencies which choose to provide those copies, without charge. As we have noted, NIH and NLM

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* "Gain is not a dirty word when applied to private, entrepreneurial authorship and publishing. The "gain" on one book or journal is used by its publisher to issue other books or journals that are not likely to make money, or are certain to lose it. The author's gain on a successful book must sustain him through the periods when other books are commercially unsuccessful.

made substantial payments out of public funds to the Xerox Corporation, suppliers and library employees in order to provide users with hundreds of thousands of reprints of copyrighted articles, including petitioner's. The Court of Claims may have assumed that publishers are so addicted to their work that, unlike these other "materialists", the thinnest carrot will suffice to keep them plodding along. But this Court made no such niggardly assumption in explicating the "economic philosophy" of the copyright clause, in *Mazer* v. *Stein.*

POINT II

Reproduction of "Single Copies" of An Article Infringes Rights Granted in Section 1 (a) of the Copyright Act.

(a) The Right "to copy"

To buttress its conclusion of "fair use", the majority opinion contends that the right "to copy" in Section 1 (a) may not apply to books and periodicals; and that the reproduction of "single copies" of petitioner's articles, "one-at-a-time", therefore might not be a right granted it by the Copyright Act.*

The opinions of Chief Judge Cowen and Trial Judge Davis, and the petitioner's brief, discuss the cases and authorities which refute this theory. We add these comments:

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* The sole basis for the majority's theory is that the dial on the Xerox machine is set at "1" each time rather than "25" or "50". If the machine ran off several copies at one time (its capacity is hundreds) even the majority would concede this was "printing" or "reprinting".

(i) The term "single copy" is a euphemism. NIH and NLM produce one copy to fill each request. If 100 individuals order a copy of the same article, the libraries produce one copy to fill each request; i.e., the libraries produce 100 "single copies", one-at-a-time, to fill the orders. Other large libraries and library networks can engage in the same systematic one-at-a-time reproduction. Commercial reproduction services, such as University Microfilms (a Xerox subsidiary), now produce and distribute "single copies" of copyrighted books, periodicals, articles, doctoral theses and other works, under license from copyright owners—using the same Xerox process employed by the government's libraries. Vast duplication of copyrighted works can be carried on by commercial and non-profit reproduction centers —creating an accumulation of single copies of the same work, made at different times. The "copies" are exact reproductions of the original type, as are the copies produced by a letter press or an offset press. The majority's erroneous and unfounded interpretation of the right "to copy" would inflict devastating injury on authors and publishers.

(ii) Sec. 1(a) grants the right "to copy", flatly and unequivocally, to all classes of copyrighted works, including books, periodicals and articles. Its plain language leaves no room for a crippling, judicial limitation on the rights of authors and publishers. Nor is the majority's extreme, semantic surgery warranted by a 90 year-old lower court decision under an earlier copyright act, containing different language; and to boot, a decision that does not even

support the majority's theory—*Harper* v. *Shoppell*, 26 Fed. 519.*

(iii) In *Douglas* v. *Cunningham*, 294 U.S. 207 (1935) this Court recognized that damages should be awarded, "even for the circulation of a single copy . . ." (210) Since circulation of a single copy is a right granted by Section 1(a), it is impossible to construe the same section as meaning that reproduction of the single copy—no less reproduction of several single copies, one-at-a-time—is not a right granted thereunder.

(iv) In its Report on the Copyright Revision Bill passed by the House in 1967, the Judiciary Committee said:

> "Unauthorized library copying, like everything else, must be judged a fair use or an infringement on the basis of all the applicable criteria and the facts of the particular case." (No. 83, 90th Cong. 1st Sess., p. 36)

The majority opinion below read the report "as affirmatively recognizing that, under *existing* law (emphasis added), library photocopying can be fair use in proper circumstances". (487 F2d. 1361) But in the very same sentence, the Report also recognizes that library photocopying ["supplying single photocopies"—p. 36] is infringement, in appropriate circumstances under present law. In both aspects, the sentence negates the majority's theory

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* The District Court ruled it was not infringement, under the 1870 Act, to make a "plate from which a copy of a portion of (plaintiff's) book could be reproduced". But, it held, the copyright would be infringed "by printing, publishing, importing, selling, or exposing *any copy* of the book." (p. 520) (emphasis added). The Xerox machines of NIH and NLM did not produce plates, they produced copies of petitioner's articles.

that the right "to copy" does not apply to articles or books. If library reproduction of single copies is sometimes infringement, it must be encompassed by the rights granted the copyright owner in Section 1(a). If library reproduction is sometimes fair use, the same result: since "fair use" is a defense offered when the defendant's use of the work is one covered by the rights granted to copyright owners. Had the Judiciary Committee thought the present law did not grant the right to produce "single copies", its discussion of library and educational photocopying would have been drastically different. (see pp. 29 to 38, ibid.)

(v) Under the fundamental rules of federal statutory construction, the right to reproduce copies—granted in Sec. 1(a) of Title 17—applies to one copy or several copies. Title 1, U.S.C. provides:

> *"Sec. 1: Words denoting number, gender and so forth.*
>
> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> Words importing the singular include and apply to several persons, parties or things;
>
> Words importing the plural include the singular;"

Citing this statute in its discussion of Sec. 106 of the Revision Bill (counterpart of present Sec. 1), the House Report said that "The references to 'copies or phonorecords', although in the plural, are intended here and throughout the bill to include the singular." (Ibid, p. 24)

(b) The Right "to Print" or "to Reprint"

The reproduction of copies by typewriter or mimeograph machine constitutes "printing" or "reprinting" under Sec. 1(a). *Macmillan Co.* v. *King*, 223 Fed. 862, 867; *American Visuals* v. *Holland*, 239 F. 2d 740, 745; *White* v. *Kimmell*, 193 F.2d 744. Obviously, reproduction on a Xerox machine is "printing" under the Section. The machine can produce anywhere from 1 to hundreds of copies. Like a letterpress or offset press, its copies reproduce the text as originally set by some typesetting device. Under Sec. 1(a), printing occurs whether the letterpress, offset press or Xerox machine turns out 1 copy or 999 copies; cf. 1 U.S.C. 1, discussed above.

(c) The Right "to Publish"

The government's libraries systematically distributed copies of petitioner's articles and other copyrighted works to thousands of patrons and users. Under its normal practices, established by the record, it was ready and willing to distribute copies of the same article to any of a number of people who chose to order it. This systematic procedure, coupled with the actual distribution of even one copy, constitutes "publishing" under Section 1. *Werckmeister* v. *American Lithographic Company*, 134 Fed. 321, 325-6; *American Visuals Corporation* v. *Holland*, 239 F.2d 740, 743; *Macmillan Co.* v. *King*, 223 Fed. 867-8. It should be noted that distribution of one copy to each ultimate user is traditional in publishing. Book stores sell one copy to each customer, for his personal use. Book clubs mail one copy to each customer, for his personal use.

POINT III

The Government's Reproduction of Petitioner's Articles was not Fair Use.

The majority reversed the Trial Judge's decision on the ground that defendant's reproduction of plaintiff's articles was fair use. Chief Judge Cowen's dissenting opinion rebuts the majority's erroneous application of the fair use doctrine. For the reasons set forth in Judge Cowen's opinion, the Trial Judge's opinion and the plaintiff's brief, we submit that the government's reproduction of the Williams & Wilkins' articles was infringement and not fair use, and that the company was entitled to reasonable compensation for such use of its copyrighted works. We add these comments:

(i) The majority opinion recognized that it was not doing justice to the petitioner: "Hopefully, the result in the present case will be but a 'holding operation' " until "Congress enacts its preferred solution." (487 F.2d 1363).

(ii) The majority's conclusion of fair use relies heavily on the view that petitioner failed to prove actual or potential injury. Actually it proved both. The majority simply waved aside the trial judge's conclusions, in its effort to rationalize its basic theory—i.e., Congress should be compelled to legislate a solution. For reasons indicated below, the fair use test of damage was amply satisfied. But we submit that the type of copying operation conducted by NIH and NLM cannot be held fair use, even if injury could not be proven under that test. As Chief Judge Cowen emphasized, the government libraries engaged in the wide spread production of "exact duplicates of (and substitutes for) the

original articles . . . ." Such "wholesale copying . . . without more defeats the defense of fair use." (487 F. 2d 1366)

(iii) If such reproduction is excused as fair use when the copyright owner cannot prove he has suffered damage, the rights of authors and publishers would be seriously impaired. Difficulty in proving actual damages is endemic to copyright. That is why the Act provides for statutory damages. *Brady* v. *Daly*, 175 U.S. 148, 154; *Douglas* v. *Cunningham*, 294 U.S. 207, 209; *F.W. Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228. Moreover, damage may be inflicted by a drawn-out process of attrition; the accumulation of many individual, minor infringements over a period of time. To prevent this "coral reef-building" effect, courts award damages even for "uninjurious and unprofitable invasions of copyright . . . to sanction and vindicate the statutory policy." *F.W. Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228, 233.

(iv) As the House Judiciary Committee Report emphasizes, the Courts must "adapt the fair use doctrine to particular situations on a case-by-case basis." (p. 32). The situation here involves systematic, wholesale reproduction of journal articles for the very readers, the very audience, for whom petitioner publishes its journals. The question of isolated, sporadic copying of an article is not involved. Trial Judge Davis believed that such copying of an entire article, under appropriate circumstances, would be fair use. But there was no need to spell out the parameters of isolated, sporadic copying in that category, since the systematic wholesale reproduction involved here clearly is not fair use. Nor would the opinions of Trial Judge Davis or Chief Judge Cowen determine the boundaries of fair use in educational

"single copying". As the Judiciary Committee's Report demonstrates, in setting out the guidelines for the application of fair use in that area, such reproduction must be evaluated in light of the circumstances presented there.

(v) The fair-use damage test, when applicable, requires consideration of the "effect of the use upon the potential market for or value of the copyrighted work." (House Judiciary Committee Report No. 83, p. 30). The majority contended sufficient proof of an adverse effect was not presented, arguing that petitioner did not make an in-depth economic survey which "proved" it would occur in the future. We submit that there are more-than-ample grounds for finding that the government's systematic reproduction of journal articles is likely to have an adverse effect on the potential market and value of scientific and technical journals published by petitioner, the American Chemical Society, the American Society of Microbiology, American Society of Testing and Materials, the National Council of Teachers of Mathematics and various University Presses. That adverse effect may be produced in various ways: decline of current subscriptions, loss of potential new subscriptions, and loss of income from the sale of reprints and licenses (by the copyright owner) to reproduce single copies.

(vi) With its suggestion that only hard and fast economic proof of future damage will suffice, the majority's ruling would preclude authors and publishers from protecting their works against the types of unauthorized use that produce damage through a gradual accumulation of individual, minor infringements. The defense of fair use would be available until the gradual movement of economic forces

produced sufficient injury to satisfy the majority's standard; but by that time, the publisher might be so far down the road to bankruptcy that a decision in his favor would be useless. We submit it is the possibility of damages in the future, rather than this year's operating statement, that must be considered under the fair-use damage test. For example: in *U.S.* v. *Loew's Inc.*, 371 U.S. 38, the defendant motion picture companies argued that their block-booking of motion pictures for television could not be an antitrust (tying) violation because "Feature films, they point out, constitute less than 8% of television programming . . ." in 1962. We dare say they could have produced any number of economic studies to support that claim, and to "prove" that no injury could possibly be suffered in the future from their practices. But the potential for future and increasing damage was inherent in the practice. And in 1974 "Feature films" are no longer the trifling 8% the film companies cited, they are the predominant, money-making bulwark of commercial television.

(vii) The potential for damage inherent in the government's systematic, wholesale reproduction of journal articles is amply apparent. A copyright owner's compensation depends on the number of uses of his work. If it is informative, educational or entertaining, a number of people will want to read it; their purchases of copies or subscriptions provide his compensation and reward. This Court has stressed that the copyright owner's reward should thus depend on the value of his work. (cf. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158).

As the demand increased among library patrons, there was a partial increase in the copyright owner's compensa-

tion. If there was a heavy demand for a successful book, the library might buy 5 or 10 copies, not just 1. If a number of patrons wanted to read articles in a scientific journal, the library might buy 3 or 4 subscriptions for these patrons, rather than 1.

(viii) The government's wholesale, systematic reproduction of journal articles, including petitioner's, has the inherent potential for totally destroying that relationship between use and the copyright owner's compensation—if the copyright owner is denied reasonable payment for these uses of his work. Where an institution's library serves its staff (as the NIH library does) only one or two subscriptions are required to meet the needs of an unlimited number of patrons who find the journal periodically publishes articles of use to them. The systematic reproduction of these articles, one-at-a-time, on demand, replaces the 3 or 4 or more subscriptions that otherwise would be needed. As Chief Judge Cowen noted, prospective patrons determine which articles to order by reading a monthly, indexed catalog (INDEX MEDICUS) published by NLM; similar abstracts and indices are available in other disciplines. Patrons could not make these copies themselves since the library will not release the one or two subscription copies of each issue; this would prevent it from making copies for other patrons, and might result in damage or loss which would compel it—heaven forbid—to purchase another copy from the publisher.

(ix) The government's systematic, wholesale reproduction also has the potential of denying petitioner and other journal publishers compensation bearing any relation to number of uses and value—when one library serves as

a reproduction center for other libraries and their patrons. NLM performs that function for several libraries and countless potential users of petitioner's journals. These libraries do not have to purchase even a single subscription to petitioner's journals; no matter how many patrons require how many articles, all are obtained by ordering reprints from NLM. With a conspicuous lack of semantic integrity, library spokesmen describe these transactions as "loans"—although each copy becomes the absolute property of the user, who does not return it. The countless patrons of other libraries, who receive "single copies" from the reproducing library, could not make the copies themselves—their libraries do not have the journals.

(x) The majority contended that the static circulation of petitioner's journals negated the potential for damage inherent in the government's systematic, wholesale reproduction operations. We disagree. The decline of *present* subscriptions over the next few years is as probable as the mushrooming of the trifling 8% role of feature films on television, to the predominant place they have captured over the 14 years following the *U. S.* v. *Loew's* decision. The recent announcement of plans by a consortium of 4 major libraries, discussed in petitioner's brief, is a foreboding harbinger of the future in store for journal publishers under the majority's opinion. Moreover, the majority failed to consider the impact of systematic reproduction on the sale of *new* subscriptions—a factor which cannot be measured with the mathematical preciseness the majority demanded. As Chief Judge Cowen noted, even a modest decline in subscriptions or the inability to secure a few new ones (to cope with inflating costs) can be fatal to scientific and technical journals which have limited circulations.

(xi) The government's systematic, wholesale reproduction of copies of petitioner's articles must adversely affect its income from the sale of reprint copies, and from licensing commercial and non-profit reproduction centers to reproduce such copies, one-at-a-time, on a royalty basis. The majority seems to suggest that the latter is not a "legitimate" source of income. It is as if this Court had found for Shanley's restaurant (*Herbert* v. *The Shanley Co.*, 242 U.S. 591) on the theory that composers derived their income in 1917 from the sale of sheet music, and therefore were not entitled to begin earning income by licensing users to perform their music.

Actually most copyright owners earn compensation from their works by licensing others to reproduce or perform them. Composers and sheet-music publishers license broadcasters to perform their songs, and record companies to record them. Authors and book publishers license others to reproduce copies of their works—e.g. book clubs, paperback reprint publishers, newspapers and magazines, anthologists, and recently, University Microfilms which reproduces single copies of older books, under license, to fill orders for works conventionally "out-of-print." Petitioner and other journal publishers are equally entitled to license "one-at-a-time" reproduction of their articles, each of which is a separate copyrighted work, and thus derive income from an ever-increasing audience of users who benefit from the efforts, labor and investment of these publishers. Only thus can the intended balance between volume of use and the copyright owner's compensation be partially maintained.

(xii) The rights granted to authors and publishers in Section 1(a) are not subject to a "for profit" limitation,

as are the public performance rights of music (House Report No. 83; p. 31). Indeed, such an exemption would destroy or seriously impair the copyright owner's rights in any work published for educational, scientific or technical audiences. Hence, the non-profit status of NLM and NIH does not entitle them to systematically reproduce copyrighted articles. Nor is the defense of fair use available on the theory the copies are produced for the personal use of scientists or researchers.* This is precisely the audience for whom plaintiff and other such publishers produce their journals. And every book and journal is published to be used by individual readers for study, information, research or other personal uses.

(xiii) As the opinions of Chief Judge Cowen, Judge Nichols and Trial Judge Davis conclusively establish, a judgment for petitioner would not stop the reproduction or dissemination of its articles, or the reproduction and dissemination of articles by other scientific and technical journal publishers. The petitioner would simply receive reasonable compensation for the use of its property rights; the reproduction would continue.

(xiv) The "Gentlemen's Agreement" was not signed by petitioner. It was not signed by any author. It was not signed by any association representing authors. In any event, such a document would not permit a Court to rule that fundamental rights granted to authors under the Copyright Act could be surrendered for all time, for all authors

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* These copies are not substitutes for note-taking. Hours of tedious labor would be required to copy a 10 or 20 page printed article by hand. When true "notes" are not sufficient, and the entire text is required, people buy copies of books and journals. That is what the government provides—a reproduction of the entire type-set text of the article, not a collection of hand-written notes.

and publishers. Even "Gentlemen" don't have that power; the Constitution gave it to Congress. Certainly a document prepared by two trade associations in 1935 could not establish a "custom" binding on individuals and organizations who were not represented, three decades later when technology had radically changed media of communication and created new ones. Indeed, "custom" cannot be legislated into existence by contract. If these associations of publishers and librarians had combined or contracted to restrain individual authors or publishers from enforcing their rights under the Copyright Act, that combined action or such contract would violate the Sherman Act and would be illegal and unenforceable. A court should not permit these two associations or their members to achieve the same forbidden result by judicially approving a so-called "custom" which they sought to establish through an "agreement".

POINT IV

Reversal of The Majority Opinion is Required to Achieve the Reasonable Solution—Licensing Systems.

Obviously, the majority was extremely uncomfortable with the decision. Terming it a "holding operation", the majority pleaded with Congress to legislate a "solution". But Congress has flatly refused to do so. The Judiciary Committee said it "does not favor a specific (statutory) provision dealing with fair use." (Report No. 83, p. 36). And it specified the solution it recommended—that publishers and users voluntarily establish "reasonable arrangements . . . providing workable clearance and licensing conditions . . ." (Ibid).

The majority erroneously assumed that such arrangements could not be established "voluntarily". It erred. Had Judge Cowen's opinion been adopted, licensing systems inevitably would have been established; and the refusal of any publisher to agree to reasonable terms would not have "stopped" library reproduction because of the provisions of 28 U.S.C. 1498(b).

Actually, the successful copyright licensing systems in this country are "voluntary", i.e. their structure and terms are not prescribed by statute. Following the decision in *Herbert* v. *Shanley*, systems for licensing the public performance of music were developed by copyright owners and users—they had no other choice. Composers knew that countless users would continue to perform their music, throughout the country; and copyright owners could not afford to continue bringing costly infringement suits for "small performances".* Both copyright owners and users needed an automatic licensing system; and they developed one, in fact several: ASCAP, Broadcast Music, Inc. and SESAC. Similar circumstances led to the voluntary establishment of nation-wide licensing systems for authorizing the thousands of performances of plays and musical comedies given annually by amateur and stock production groups. Moreover, the preponderance of licenses to record musical compositions are negotiated voluntarily through an industry-wide clearing house, not under the so-called compulsory license clause of the Copyright Act [Sec. 1(e)]. Actually, the compulsory-license clause does not establish

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* The license fee for an individual performance is minor; often only a few cents. Performance fees produce income because the licensing system permits collection of a large aggregation of these minor payments.

a licensing system. It simply allows the recording of musical compositions, without the author's consent, at a fixed royalty of 2¢ a record. This inflexible approach would not serve the interests of publishers, librarians or library users.

The establishment of "voluntary" licensing systems for library reproduction of journal articles, the solution expressly preferred by Congress, is inevitable if this Court reverses the decision below and adopts Chief Judge Cowen's conclusion. Under Sec. 1498 (b) (Title 28), the government libraries will be free to continue reproducing the articles of petitioner or any other publisher who does not wish to negotiate a reasonable licensing system, mutually acceptable to the libraries and the publisher(s). Neither petitioner nor any other publisher can afford to continue bringing such suits. Their costs would far exceed the modest compensation the Court of Claims will award. Copyright owners and librarians will be left no choice but to negotiate mutually satisfactory licensing arrangements. These will not be frozen into a statute, but can be jointly revised and adapted to changing conditions and the differing needs of various classes of users.

The majority argued that Sec. 1498(b) would not assure non-governmental libraries that publishers would negotiate voluntary, mutually acceptable licensing systems. However, the many government libraries could provide reproduction service to private libraries with respect to articles of any publisher which refused to negotiate mutually acceptable licensing arrangements. Moreover, any non-governmental library "acting for the Government and with the authorization or consent of the Government", in systematically reproducing copies of articles without the publisher's

consent would be subject to the provisions of Sec. 1498(b). It would be free to continue reproducing articles, and the publisher would be entitled to recover reasonable compensation from the United States.

Just as copyright owners cannot afford to continue bringing suits under Sec. 1498(b), library officials will not be in a position to continue provoking such suits by refusing to negotiate reasonable licensing arrangements. Sec. 1498(b) provides the necessary impetus (and protection) to both users and copyright owners to accomplish the voluntary licensing solution urged on them by the Congress.

The majority opinion offers no hope of a reasonable solution. Congress has refused to legislate licensing. Library representatives have twice broken off discussions with representatives of learned-society and private journal publishers, university presses and authors—discussions aimed at negotiating voluntary, mutually acceptable solutions to the library copying problem.* The majority opinion will only make them more intransigent.

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* Hearings Before the Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, United States Senate (93rd Congress, 1st Session, July 31 and August 1, 1973), pp. 144, 146, 175.

CONCLUSION

It is respectfully submitted that the decision of the Court of Claims should be reversed, and that judgment should be entered for the plaintiff on the findings and conclusions of the Trial Judge.

Respectfully submitted,

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